A Place for the Privileged Will

Jack Tsen-Ta Lee, Singapore Management University

Available at: https://works.bepress.com/jacklee/6/
A Place for the Privileged Will*

JACK LEE TSEN-TA

Most people consider the proper distribution of their property on death a vitally important matter. For those who are elderly, ill or engaged in risky occupations, it is often urgent to get such things settled fast. But some people may be in circumstances where they cannot comply with the formal requirements for a valid will.1 The law has long recognised this concern in the case of soldiers and sailors by allowing them to create privileged wills. Many jurisdictions, including Singapore, have legislation to this effect. Today, “soldiers being in actual military service” and “mariners or seamen at sea” can make privileged wills using any form of written or oral words, provided that they are a deliberate expression of the testator’s wishes and are intended to have testamentary effect.2 None of the normal formalities are required.

* He thanks Ms Koh Sian Ann of Legal Services MINDEF for her help in providing information for the article, and Mr Barry C Crown for his useful comments.

1 By s 5 of the Wills Act, Cap 352, 1985 Rev Ed, a will must be in writing and signed by the testator, and such signature must be made or acknowledged as his or hers in the presence of two or more witnesses present at the same time. The witnesses themselves must sign the will in the presence of the testator.

2 In the Estate of Knibbs, Flay v Trueman [1962] 2 All ER 829, [1962] 1 WLR
However in recent years academics and law reform commissions from various jurisdictions have called for the abolition of privileged wills.

This article seeks to determine if there remains a place for the privileged will today. The rationale behind them will be compared to interpretations placed by courts on modern-day provisions recognising privileged wills. It will be shown that there is still a role for the privileged will and that it should be redefined, not removed.

I. LEGISLATIVE HISTORY

A. Roman Origins

In early Roman or civil law, rigid formalities and rituals were required for executing wills, but from the time of Julius Caesar in the 1st century BC, soldiers and later seamen in naval service were granted the special privilege of making wills without formalities.

B. English Law

The Wills Act 1540 (32 Hen VIII c 1) was the first English statute

852 (no requisite intention; deceased’s words assumed that arrangements had already been made for his sister to receive his entire estate, but they had not). Testators need not know they are actually making a will, as long as they intend to give expression to their wishes in the event of death: In the Estate of Donner [1917] 34 TLR 138 (no requisite intention; deceased’s words merely affirmed his incorrect belief that his mother would be entitled to his whole estate if he died intestate); Re Stable, Dalrymple v Campbell [1919] P 7; In the Estate of Beech [1923] P 46; In the Estate of MacGillivray [1946] 2 All ER 301.

3 See generally Andrew G Lang, “Privileged will – a dangerous anachronism?” (1985) 8 Univ of Tas LR 166 at 166-68.

4 Ibid at 166-67. See also Thomas Collett Sandars, The Institutes of Justinian (1956) at 178, lib II tit XI (“De Militari Testamento”), who states that the privilege “dates from the time of Julius Caesar, who granted it as a temporary concession. It was made a general rule by Nerva, and confirmed by Trajan”.

852
to prescribe formalities for the disposition of real property. Before this time, succession was governed solely by ecclesiastical law.\textsuperscript{5} The statute did not extend to wills of personal property; such wills continued to require no formalities and could be created orally.\textsuperscript{6} Despite the Wills Act 1540, Henry Swinburne noted in his work \textit{A Brief Treatise of Testaments and Wills} that by 1590 privileged wills were considered part of the law of succession through the influence of the civil law.\textsuperscript{7}

But the earliest mention of the privileged will in an English Act came about through the Statute of Frauds 1677 (29 Car II c 3). The purpose of this statute, according to its preamble, was to prevent “Frauds and Perjuries” which the informal creation of wills had led to. The statute laid down procedures applying to most wills dealing with both real and personal property, in particular prescribing for the first time various formalities for wills disposing of personal property worth more than £30. However, s 23 of the Act made an exception by expressly giving soldiers and sailors the privilege to continue making valid wills informally:

XXIII. Provided always, That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate, as he or they might have done before the making of this act.\textsuperscript{8}

\textsuperscript{5} For theories on how the law of succession fell under ecclesiastical jurisdiction, see John Selden’s third tract, “Of the Original of ecclesiastical jurisdictions of Testaments” in \textit{Tracts Written by John Selden} (1683) and Thomas Edward Scrutton, \textit{The Influence of the Roman Law on the Law of England} (1884, reprinted 1985) at 166-69.

\textsuperscript{6} D C Potter, “Soldier’s wills” (1949) 12 MLR 183 at 183.

\textsuperscript{7} See above, n 3 at 167, for a citation of the relevant passage.

\textsuperscript{8} \textit{Statutes at Large} at 409. There is some confusion about the correct section. \textit{Statutes at Large} gives the relevant provision as s 23, while many authorities incorrectly state it to be s 22.
Most authorities trace the privilege to Roman law. Sir Leoline Jenkins, who prepared the relevant part of the Statute of Frauds 1677, mentioned in a preface to his biography that he had obtained for soldiers of the English army the full benefit of the testamentary privileges of the Roman army.

This provision reappeared in s 11 of the Wills Act 1837 (7 Will IV and 1 Vict c 26) in the following form:

11. Provided always . . . that any soldier being in actual military service, or any mariner or seaman at sea, may dispose of his personal estate as he might have done before the making of this Act.

This section is still in force today, extended by the Wills (Soldiers and Sailors) Act 1918 (c 58) to persons under the age of 21, and for the disposition of realty in addition to personalty. The involvement of naval forces in land operations and the advent of air warfare during World War II (1914-18) also prompted legislators to extend privileged wills to cover personnel in these situations.

C. Singapore

The general provision for privileged wills in the English Wills Act

9 See Drummond v Parish (1843) 3 Curt 522 at 531, 163 ER 812 at 815; Godfrey Cole, “How active is actual military service?” [1982] Conv 185 at 185; Martin Davey, “The making and revocation of wills – I” [1980] Conv 64 at 70; F C Hutley, “Privileged wills” (1949) 23 ALJ 118 at 119; see above, n 3 at 166.

10 Drummond v Parish, ibid. Contra n 6 at 184: “Today, however, in spite of a long line of judicial references to the civil law and a tendency among writers to turn to the Corpus juris as to the original source, we may safely consider the Roman fallacy to have been exploded.”

11 Wills (Soldiers and Sailors) Act 1918, s 1.

12 Ibid, s 3(1).

13 Ibid, see s 4 and 5(2) respectively. See Terence Prime, “The privileged will in
1837 was adopted with minor alterations in s 28 of the Indian Act XXV of 1838. The effect of this Act extended to Singapore, for during this period it was the Governor-General of India in Council who was explicitly empowered to legislate for the Straits Settlements, which included Singapore. The Singapore provision was amended by s 4 of the Wills (Amendment) Ordinance 1938 (Act 21 of 1938) in an identical manner to the UK Wills (Soldiers and Sailors) Act 1918. It exists today as s 26(1) of the Wills Act, Cap 352 (1985 Ed):

26(1). Notwithstanding anything in this Act any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act and may do so even though under the age of 21 years.

Section 26(1) has yet to be considered judicially in Singapore, despite having been on the statute books for more than 150 years. But since it is identical in all material respects to the corresponding United Kingdom provision, the law in England and Singapore is probably the same.

II. RATIONALE BEHIND THE LAW

The Roman origin of the privilege provides much insight into the rationale behind privileged wills.

*Mortal danger*. During Roman times, the privilege was restricted to soldiers who were *in expeditione* (on an expedition), ie living in camp on actual military service after receiving orders to proceed


15 Sandars, The Institutes of Justinian, see above, n 4 at 175 para 3; see above, n 3 at 167.
to the battlefront. This was probably because it was only in such situations that soldiers and sailors were considered to face mortal danger in the course of their duty, and risked dying before a formal will could be made.

**Lack of legal advice.** Warfare and sea travel involve long periods of absence from home, and in the past there were no speedy or reliable means of communication. Most ordinary Roman soldiers did not know how to create a valid will. This meant that during active duty they were *inops consilii* ("without advice") – being parted from their civil surroundings, they were without readily available means of consultation and professional advice to properly execute a will. Privileged wills remained important in the 19th century as conditions of war were not considered conducive for creating proper wills. Few soldiers then were able to write, and even fewer had the means to commit a document to anything like safekeeping. Soldiers also did not have the opportunity of consulting friends, or assessing property and deciding the best way to dispose

---


17 *Sherman v Pyke* (1724), cited in *Drummond v Parish*, see above, n 9 at 541, 818: “It must be under actual engagement, attended with danger, otherwise mounting at Whitehall would be sufficient...” In *Drummond*, a soldier living in barracks in peacetime was held not to be entitled to the privilege. See below, n 22 at 195 *per* Denning LJ. This view was accepted in English law up to the mid-19th century but declined thereafter. See above, n 6 at 184-85, where Potter attributes this to the replacement of Ecclesiastical Courts with barristers of the Probate Court in 1857, and a new sympathy for the “simple soldier”.

18 Sandars, *The Institutes of Justinian*, see above, n 4 at 173: “The necessity for the observance of these formalities in the construction of testaments has been dispensed with ... in favour of military persons, on account of their excessive unskilfulness in such matters.”

19 *Sherman v Pyke*, see above, n 17, 3 Curt 522 at 540, 163 ER 812 at 818. *In Re Wingham*, see below, n 22 at 195-96 *per* Denning LJ; Peter Bailey, “A soldier’s privileged will in Northern Ireland” (1982) 33 NILQ 53 at 56.
of it by will.\textsuperscript{20} It is submitted that many of these justifications for privileged wills remain cogent today.

\textit{Reward for selflessness; psychological benefit.} Apart from Roman law, commentators have justified the capacity to make privileged wills as a reward for engaging in socially beneficial occupations which involve risk. The privilege also gives testators a sense of security in knowing that if they die in the course of duty, arrangements would have been made for their affairs.\textsuperscript{21}

\section*{III. PROBLEMS WITH THE LAW}

\subsection*{A. Over-Expansive Interpretation}

However in the landmark English decision of \textit{In re Wingham (decd), Andrews v Wingham} the Court of Appeal refused to inquire into the reasons for the privilege. \textquote{The privilege is one thing. The reasons for it are another.}\textsuperscript{22} In particular, Denning LJ felt that the English soldier\textquotesingle s military testamentary privilege was not identical to that of the Roman legionary: \textquote{This supposed throw-back to Roman law has confused this branch of law too long. It is time to get back to the statute.}\textsuperscript{23} The court in \textit{Wingham} and subsequent cases have proceeded to interpret the provisions of the Wills Act 1837 literally.\textsuperscript{24}

1. \textit{\textquotec{Soldiers}}

The word \textit{soldier} has long been given a wide definition. It appears

\textsuperscript{20} See above, n 6 at 184, 187.

\textsuperscript{21} Clive V Margrave-Jones, \textit{Mellows: The Law of Succession} (5th ed, 1993) at 82 para 7.4; see above, n 3 at 176.

\textsuperscript{22} [1949] P 187 at 195, \textit{per} Denning LJ.

\textsuperscript{23} \textit{Ibid}; cf\textit{Bailey}, see above, n 19 at 55.

\textsuperscript{24} Prime, see above, n 13.
that the word encompasses any person working as a soldier, and not just members of the official armed forces. *In the Goods of Donaldson*\(^{25}\) held that a soldier employed by the East India Company was entitled to the privilege. In *Wingham*,\(^{26}\) in addition to army soldiers, the word was held to include persons undergoing military training, members of forces who work both at their jobs and man defences (a local equivalent would be members of the Singapore Joint Civil Defence Forces), and auxiliary personnel serving with armed forces such as doctors, nurses and chaplains.\(^{27}\) The New South Wales Court of Appeal went even further in *Re White’s Application*.\(^{28}\) In that case, a British subject domiciled in New South Wales was employed during World War II by the United States Army as a civilian engineer. He was issued with papers which showed he had a status equivalent to that of a major in the United States Army, and that in the event of capture he was entitled to be treated as an officer prisoner-of-war. The court held he was entitled to make a privileged will.

2. “*Actual Military Service*”

It was once thought that a soldier on actual military service was in the same position as a Roman soldier *in expeditione*.\(^{29}\) He or she had to be either serving overseas in a campaign, or be mobilised and about to serve overseas.\(^{30}\) This idea was exploded

\(^{25}\) (1840) 2 Curt 386, 163 ER 448.

\(^{26}\) See above, n 22 at 196.

\(^{27}\) See also *In the Goods of Stanley* [1916] P 192 (nurse); *In the Goods of Taylor* [1933] IR 709 (surgeon).

\(^{28}\) [1975] 2 NSWLR 125.

\(^{29}\) *Drummond v Parish*, see above, n 9, applied by *White v Repton* (1844) 3 Curt 818, 163 ER 912 and *In the Goods of Hill* (1845) 1 Rob Eccl 276, 163 ER 1038. See above, n 15 and 16, and accompanying text.

\(^{30}\) *In the Goods of Hiscock* [1901] P 78 (soldier in barracks under orders);
by *Wingham’s* case. In *Wingham*, a soldier was on operational duties as a trainee pilot in Saskatchewan, Canada, during World War II. Saskatchewan was only a day’s flying from the enemy. During this time he wrote an informal will leaving his property to the plaintiffs. But after becoming a pilot instructor, he was injured in an aircraft accident and died in hospital. Both Bucknill LJ and Cohen LJJ felt that since the deceased testator was liable at any time to be ordered to proceed to some area to take part in active warfare, he was in “actual military service”.\(^{31}\) Bucknill LJ went on to define the phrase broadly as “military service that is directly concerned with operations in a war which is or has been in progress or is imminent”.\(^ {32}\) No actual declaration of war is necessary to invoke the privilege.

Denning LJ’s formulation was similar,\(^ {33}\) and he added that this would include all kinds of people whether “in the field or in barracks, in billets or sleeping at home. It includes them although they may be captured by the enemy or interned by neutrals”. But he went further by commenting:

> Doubtful cases may arise in peacetime when a soldier is in, or is about to be sent to, a disturbed area or an isolated post, where he may be involved in military operations. As to these cases, all I can say is that, in case of doubt, the serving soldier should be given the benefit of the privilege.

However, he felt the privilege did not extend to officers on half-pay, reservists, personnel in overseas territories not called up

---

\(^{31}\) See above, n 22 at 192, 194.

\(^{32}\) *Ibid* at 192.

\(^{33}\) *Ibid* at 196.
for service, or members of armed forces serving at home or on routine duty overseas in times of peace when military operations were not imminent.

Later cases have continued to extend the meaning of “actual military service”. Long after fighting has ceased, soldiers may still be in actual military service as members of an army of occupation. The term also includes quasi-military operations. In Re Jones, the deceased was obliged by the conditions of his service and in accordance with the discipline which prevailed in his military unit to go out on patrol in Northern Ireland. He was shot by a terrorist, but managed to tell an ambulance worker, “If I don’t make it, make sure Anne gets all my stuff,” before he passed away en route to the hospital. Anne was his fiancee. It was held that this was active military service even though the enemy was not a uniformed force engaged in regular warfare or even an insurgent force organised along conventional military lines but a “conjuration of clandestine assassins and arsonists”.

Re Jones followed the Australian decision In the Will of Anderson, which involves the Malayan Emergency. The court decided that “actual military service” does not imply a state of international conflict. It was sufficient for a soldier to be under orders to proceed to Malaya, where an internal state of emergency had been proclaimed on 18 June 1948, as a member of an Australian contingent to aid the Malayan Government against Communist rebels. In In re Berry (deed), Public Trustee v Berry a soldier sent to South Korea as part of United Nations troops acting under the United Nations Charter to repel an attack by North Korea

34 Re Limond [1915] 2 Ch 240; In the Estate of Colman [1958] 1 WLR 457.
35 [1981] 1 All ER 1.
36 Ibid at 5, 6.
37 (1958) 75 WN (NSW) 334.
was also held to be entitled to make a privileged will. The court pointed out that “actual military service” did not just mean *de jure* wars, but any form of “warlike operations”. These cases also show that the likelihood that a privileged will may be needed today in this part of the world is not remote.

3. “Mariner or Seaman”
"Mariner or seaman” has been held to mean all ranks of naval forces\(^{39}\) and merchant seamen,\(^{40}\) including ancillary staff serving on board a sailing vessel.\(^{41}\)

4. “At Sea”
The phrase “at sea” has also been given a broad meaning. Apart from its natural meaning it includes service on board a vessel stationed permanently in a harbour,\(^{42}\) or lying in a river before sailing.\(^{43}\) A person who makes a will on land during the course of a voyage\(^{44}\) has the privilege, and so does a person who is under

---

39 *Earl of Euston v Lord Henry Seymour* (1802) (admiral), cited in *In the Goods of Hayes* (1839) 2 Curt 338, 163 ER 431 (purser); *In the Goods of Saunders* (1865) LR 1 P & D 16 (surgeon); *In the Goods of Rae* (1891) 27 LR (Ireland) 116 (surgeon); *In the Estate of Yates* [1919] P 93 (lieutenant).

40 *Morrell v Morrell* (1827) 1 Hagg Ecc 51, 162 ER 503; *In the Goods of Milligan* (1849) 2 Rob Ecc 108, 163 ER 1258; *In the Goods of Parker* (1859) 2 Sw & T 375, 164 ER 1041.

41 *In the Estate of Knibbs, Flay v Trueman* [1962] 2 All ER 829 (barman on a liner); *In the Goods of Hale* [1915] 2 IR 362 (typist on a ship).

42 *In the Goods of M’Murdo* (1868) LR 1 P & D 540.

43 *In the Goods of Austen* (1853) 2 Rob Ecc 611, 163 ER 1431; *In the Goods of Patterson* (1898) 79 LT 123; cf *Hodson v Barnes* (1926) 43 TLR 71 (pilot on canal who lived ashore not in expeditione).

44 *In the Goods of Lay* (1840) 2 Curt 375, 163 ER 444. This case was distinguished in *In the Goods of Corby* (1854) 18 Jurist 634 (ship in port held not to be “at sea”).
orders to join a ship. Re Rapely’s Estate, Rapely v Rapely establishes that sailors are considered “at sea” in these situations:

i. When serving or employed in naval or merchant marine service regarded as sea service. The nature of the service is immaterial.

ii. When they are serving on a ship or are on long-shore leave home, if they are members of a particular ship’s company.

iii. When they are already under orders to join another ship in a fleet, if they are not members of a particular ship’s company but have been employed by the owners of a fleet of ships and have been discharged from one ship.

However the privilege does not apply to people who are under orders to join a ship for short periods at a time while living and working from home, such as the captain who ran a ferry across the English Channel in Barnard v Birch.

Such wide interpretations of the English equivalent of s 26(1) mean that people who are not in life-threatening situations, or actually have reasonable access to legal advice, are able to make privileged wills. Ignoring the original reasons behind the rule makes a nonsense of it.

B. Rules of Revocation

Re Gossage, Wood v Gossage establishes that an informal letter or act made while a person is privileged which expresses an intention to revoke a previous will (whether properly-executed or

---

45 *In the Goods of Newland* [1952] P 71; *In the Goods of Wilson* [1952] P 92, [1952] 1 All ER 852.


47 [1919] 2 IR 404.

48 Davey, see above, n 9 at 71: “... [O]nce the original reason is divorced from the actual wording of the statutory privilege it is difficult to see any justification for the privilege as enacted.”; Hutley, see above, n 9 at 119.
informal) effectively revokes it. Although a testator loses the privilege of making informal wills after returning to civilian life, this does not revoke any informal will made while the privilege existed: *Re Coleman*. Unfortunately, these rules make it possible for privileged testators to dispose of their property “by a chance remark, or by a letter written in a temporary fit of anger”, revoking any formal wills created previously. A testator’s long-forgotten privileged will may also turn out to be effective: in *In re Booth*, a privileged will made in 1881 was admitted to probate 45 years later in 1926.

C. Possibility of Fraud
The lack of formalities required for privileged wills facilitates fraud. As D C Potter put it:

“… [T]he limits upon the Roman privilege made it a more rational institution than our privileged will.”

[1921] P 194 (CA).

In *Mellows*, see above, n 21 at 88 para 7.25, the author finds an apparent inconsistency between the English provisions dealing with revocation of wills and privileged wills (*in pari materia* with s 14 and 26 of the Singapore Wills Act respectively). It is submitted that no contradiction exists. Section 14 states *inter alia* that a will may be revoked by “another will or codicil executed *in the manner by this Act required*, or by some writing declaring an intention to revoke it, and executed *in the manner in which a will is by this Act required to be executed*”. While the italicized phrases might mean that any new will or writing declaring an intention to revoke must be executed in accordance with the formalities required by s 5, they might just as well refer to s 26 with the result that no formalities for revocation are needed for privileged testators.

[1920] 2 IR 332.

See above, n 6 at 190. Also Hutley, see above, n 9 at 119 col 2; see above, n 3 at 178.

[1926] P 118.

... [I]t will be open to anyone brazen enough to be undeterred by the risk, to assert that the deceased once made a verbal will in his favour; or a will on a scrap of paper, since lost; and this will be possible even where the deceased made a solemn will before entering the uniformed force.\textsuperscript{55}

Several people might also collude in defrauding a testator’s estate. A defrauder might pay an accomplice to falsely testify that the deceased testator created a privileged will leaving property to the defrauder.

IV. WHY WE SHOULD KEEP THE PRIVILEGE

For these reasons many commentators have called for privileged wills to be abolished.\textsuperscript{56} However there are convincing grounds for retaining the privilege.

A. \textit{Lack of Knowledge in Will-Making}

In days past most of the population, including soldiers and sailors, were poorly educated and lacked the knowledge and skill required to make wills.\textsuperscript{57} Today the general level of education and literacy in society is high, and soldiers have ample opportunity to make formal wills while undergoing training.\textsuperscript{58} It has therefore been suggested that the right to create is privileged wills is no longer necessary.

But people in jurisdictions such as Australia and the United Kingdom generally tend to be more aware of their legal rights

\textsuperscript{55} See above, n 6 at 190.

\textsuperscript{56} Bailey, see above, n 19 at 58-59; Davey, see above, n 9 at 71-72; Hutley, see above, n 9 at 120 col 1; see above, n 3 at 179; Note (1949) 65 LQR 6 at 7. \textit{Contra} n 54 at 1109 col 3.

\textsuperscript{57} See above, n 3 at 177; see above, n 6 at 184.

\textsuperscript{58} Note, see above, n 56 at 7.
than their Singapore counterparts. Soldiers in particular are well-informed of their legal rights by military authorities, and may even be more knowledgeable than civilians.\footnote{59} For instance, a recruit in the Australian Defence Force has access to legal officers who provide general advice about the need to make wills and assist in drafting them. The will is then held in safe custody until the soldier’s discharge.\footnote{60} Legal advice is also available before and after moving into a combat zone.\footnote{61} The situation in Singapore is different. No such arrangements exist, so there is probably a significant number of ordinary soldiers who are unaware of how to create a formal will. Although the Ministry of Defence does provide a Will Preparation Service run by volunteer lawyers, it is not available to full-time national servicemen, operationally-ready national servicemen (formerly called reservists) or civilian staff, but only to regular uniformed servicemen and women.\footnote{62} These service personnel are also expected to appreciate the importance of will-making and to avail themselves of the service as there is as yet no policy or directive that requires military authorities to advise them to execute formal wills, or of their capacity to make privileged wills, before embarking on tours of duty such as United Nations peacekeeping missions.\footnote{63} Therefore the privilege is still needed to protect personnel who have not executed a formal will but are in circumstances of danger without legal advice.

\footnote{59}{See above, n 54 at 659 col 1.}  
\footnote{60}{NSW Law Reform Commission, Community Law Reform Program Eighth Report: Wills – execution and revocation (LRC 47, 1986) at 147 para 11.25.}  
\footnote{61}{See above, n 3 at 177.}  
\footnote{62}{Pioneer: Magazine of the Singapore Armed Forces (April 1994, issue 198) at 28.}  
\footnote{63}{This is based on a letter (reference MINDEF 4-4/26-11-1 dated 5 November 1993) and oral clarifications made on 16 November 1993 by the Ministry of Defence in response to the writer’s queries.}
B. Effecting the Testator’s Wishes

It has been suggested that it does not matter if a testator dies without making a will, since legislation dealing with intestacy and provision for the family\(^{64}\) will ensure that family members will be cared for.\(^{65}\) However this overlooks the most important reason for a will: to give effect to testators’ wishes. They may want to leave their real property and possessions to a fiancee, trusted friend or charity instead of to family members, or to bequeath certain personal effects of sentimental value to specific persons.

For a will to be properly executed, at least two witnesses are required.\(^{66}\) But testators in life-threatening circumstances may find themselves with only one witness present. In such cases, a privileged will is the only way the testator’s wishes can be made known.

C. Age of Majority

Formerly, privileged wills were needed because a large proportion of soldiers and sailors were minors and lacked the capacity to make formal wills even though they were engaged in the defence of their country. In Australia and the United Kingdom the general age of majority has been lowered by statute from 21 to 18. Thus, the argument goes, the special privilege is no longer needed since testators who are under 21 can now make valid wills.\(^{67}\)

This argument is not applicable to Singapore. As no law has ever been passed to lower the age of majority, it remains at the

---


\(^{65}\) Cole, see above, n 9 at 190.

\(^{66}\) Section 5(2) of the Wills Act, Cap 352, 1985 Rev Ed.

\(^{67}\) See above, n 60 at 146 para 11.22; see above, n 3 at 177.
common law age of 21. In fact, the Wills Act states that the age of majority for the purpose of making a valid will is 21, and section 26(1) is specifically extended to soldiers and sailors under the age of 21. However, most men are enlisted for full-time national service at the age of 18.

During the 9th to 11th centuries, 15 was the general age of majority in Britain and Northern Europe as children were considered adults when they were capable of farming work. By the time of the Magna Carta (1215), the age of majority had been raised to 21. There is strong authority to suggest that 21 was regarded as the age when men were able to wear a heavy suit of armour and lift a lance or sword at the same time, the role of the mounted knight having gained in importance during the time of the Norman Conquest (1066). Later on, 21 became the universal age of majority for all classes of subjects: Report on the Committee on the Age of Majority (Cmnd 3342, 1967) at 20-23 paras 36-50.

There used to be some doubt about the age of majority in Singapore. Moscow Narodny Bank Ltd v Ko Teck Kin (widow) [1982] 2 MLJ xcvi held that section 1 of the UK Family Law Reform Act 1969 (c 46) which reduced the age of majority in the United Kingdom from 21 to 18 was applicable in Singapore through section 5(1) of the Civil Law Act, Cap 43, 1985 Rev Ed. This was tacitly upheld on appeal by the Chief Justice. Ko Teck Kin was not considered in Bank of India v Rai Bahadur Singh [1994] 1 SLR 328 and must now be taken to have been impliedly overruled by it. The Court of Appeal in Rai Bahadur Singh agreed with the High Court decision ([1993] 1 SLR 634) that whether minors are of full age or not is a question of legal status and not mercantile law. Hence section 5(1) of the Civil Law Act is irrelevant, and the UK Family Law Reform Act 1969 is inapplicable to Singapore. The age of majority is governed by the common law as permanently received in Singapore by the Second Charter of Justice 1826, and is therefore 21 (see Herbert v Turball (1633) 1 Keb 590, 83 ER 1129; Sir Robert Howard’s Case (1699) 2 Salk 625, 91 ER 528; Anon (1704) 1 Salk 44, 91 ER 44; Fitz-Hugh v Dennington (1704) 6 Mod 259, 87 ER 1005). The matter has now been put beyond dispute by the Application of English Law Act, Cap 7A, 1994 Ed. Section 6(1) of the Act repealed section 5 of the Civil Law Act, while section 4(1)(a) made only those English Acts listed in the First Schedule applicable in Singapore. The UK Family Law Reform Act 1969 was not listed.

Section 4 of the Wills Act, Cap 352, 1985 Rev Ed.

Men not under the age of 18 who are subject to the Enlistment Act, Cap 93, 1985 Rev Ed are placed under a duty by section 10 to report for enlistment if required by proper authority.
V. A PLACE FOR THE PRIVILEGED WILL

Present inconsistencies in the law relating to privileged wills can be eliminated by redefining s 26 of the Wills Act so that it accords with the rationale underlying privileged wills.

**Imminent risk of death.** The section should be amended to define the privilege by the circumstances in which individuals are placed.\(^71\) Testators should only be allowed to create privileged wills if they find themselves at imminent risk of death.\(^72\) Such an imminent risk could be considered present if testators reasonably contemplate death occurring within the immediate future, and from some impending reason known to them.\(^73\) A subjective and irrational fear of death sometime in the future will not do.

Redefining the privilege in this way means that it should no longer be confined to just members of the army, navy and airforce, but should extend to people of other vocations such as police officers, firefighters and bomb disposal personnel. This is more consistent with the rationale behind privileged wills.

Situations of imminent risk of death should be narrowly defined and developed on an incremental basis by courts. People should be considered to be at imminent risk of death only when actually engaged in dangerous work as part of their occupation. For instance, it should not be enough for the crew of an aircraft to be airborne. The privilege should apply only if the aircraft is experiencing engine trouble, caught in a violent storm, or involved in a hijacking. Similarly, a firefighter battling a dangerous fire

---

\(^{71}\) This suggestion is also proposed in *Mellows*, see above, n 21 at 90 paras 7.30-7.31.

\(^{72}\) See above, n 16 at 673 col 3, where Cole suggests clarifying some of the problems raised by *Wingham* by restricting privileged wills to the Roman law concept of *in expeditione*.

\(^{73}\) This requirement has been applied in the context of a *donatio mortis causa*: see *Re Craven’s Estate, Lloyd’s Bank v Cockburn (No I)* [1937] Ch 423, [1937] 3 All ER 33.
and a police officer in actual pursuit of a dangerous criminal
would have the privilege, but not if they were merely on duty
in the station. People who are seriously injured as a result of a
hazardous profession and who are at a real risk of dying should
also be privileged. But testators who in reality are not isolated
from civilian life and are able to seek proper advice should be
denied the privilege. An example would be a soldier posted during
wartime to an operational headquarters or training facility within
a populated area away from the combat zone.

The privilege should only last as long as imminent risk of
death remains. Once the risk disappears, the privilege should no
longer be exercisable.\footnote{74} For instance, a ship’s crew should have
the privilege while a severe storm rages, but once it dies down
and the ship is out of danger the privilege should cease.

\textit{Automatic revocation.} Any privileged will or act of revoca-
tion should be deemed revoked once the imminent risk of death
ceases,\footnote{75} or one year after its creation,\footnote{76} whichever comes sooner.
For example, any privileged will created by a person seriously
injured and hospitalised as a result of engaging in a risky vocation
should be considered of no effect once his or her condition is
stable and intensive care is no longer required. Such a measure
would avoid the problem of long-forgotten wills surfacing later

\footnote{74} This is similar to a \textit{donatio mortis causa}: “... [I]f the donor does not die
then the gift is not to take effect and the donor is to have back the subject
matter of the gift.”: see above, n 73 at 426.

\footnote{75} C/Hutley, see above, n 9 at 119 col 1: “… [W]hy should an informal will
not be regarded, as it appears to have been in Roman Law, as a tentative
will which ceased to be effective unless formally confirmed after the soldier
returned from the campaign?”

\footnote{76} Commentators have suggested that this Roman rule can be used to limit
the effect of privileged wills; see above, n 3 at 180; Mellows, see above,
 n 21 at 90 para 7.30. At Roman law, a privileged will only remained valid
for one year after the testator was honourably discharged from the army:
\textit{The Institutes of Justinian}, see above, n 4 at 175 para 3.
to plague the deceased testator’s family and the court. It would also compel privileged testators to execute proper wills.

Safeguards against fraud. The fundamental problem with privileged wills is that they reintroduce the problems which the Wills Act was supposed to cure. The lack of formalities needed to create them creates possibilities for uncertainty, or worse still, fraud. But since there still remains a role for privileged wills, the question is not whether we should allow them, but where a balance should be struck. Ideally, any person in a situation of imminent risk of death should be allowed to exercise the privilege. But an enlargement of the privilege in such an indeterminate manner would probably lead to overwhelming litigation and deception.

Accordingly, it might be advisable to narrow the scope of the privilege. This would dilute the effect of the privilege as a form of protection for testators in dangerous situations but reduce the accompanying difficulties. As a start, we might limit the exercise of the privilege to those people engaging in specified risky occupations deemed beneficial to society, such as the crews of aircraft and sea-going vessels, firefighters, military and quasi-military personnel (e.g., civil defence personnel), police and quasi-police officers (e.g., narcotics officers), and people involved in disaster relief and rescue work (e.g., bomb disposal squads). Such occupations could be listed in a schedule to the Wills Act amendable as circumstances require by Parliament or perhaps a designated Minister.

If we could be certain there would be no deceit, a testator’s will made orally and witnessed by a single person might be considered a sufficient valid disposition of his or her property. But since we cannot be sure of this, other legal safeguards which might be employed include (1) allowing oral privileged wills, but requiring at least the presence of two witnesses, one of whom is not a beneficiary; or (2) not requiring writing, but barring claims by all beneficiaries who are also witnesses to the execution of the privileged will. It is submitted that either of these precautions should suffice, but if additional protection is deemed necessary, we might
also (3) require all privileged wills to be in writing but dispense with the signatures of the testator and witnesses; (4) require all privileged wills to be in the testator’s own handwriting, though it need not be signed by the testator or any witnesses; or (5) if a formal will is found to be extant, hold the privileged will to be of no effect to the extent of the inconsistency. Introducing these requirements would greatly weaken the value of the privileged will but might provide better precautions against fraud.

The law of privileged wills has been considered by law reform commissions of several jurisdictions. In Australia, the New South Wales Law Commission recommended that no class of persons should have the status of being privileged testators. The Law Reform Commission of British Columbia in Canada recommended removing the privilege with reference to adult soldiers and sailors. The United States’ Uniform Probate Code, which individual states can adopt, contains no provision for privileged wills.

Conversely, the Queensland Law Reform Commission doubted the value of these special privileges but felt the privilege should be preserved with only minor statutory amendments. In Tasmania the Law Reform Commission, after having referred in its working paper to possible reform to privileged wills, made no recommendations in its report. The UK Law Reform Committee thought on balance that there was a case for retaining the privilege in its

---

77 Cole, see above, n 9 at 189; Hutley, see above, n 9 at 120 col 1; see above, n 3 at 180.
78 See above, n 60 at 149 para 11.36.
79 See above, n 3 at 179.
80 Ibid.
81 Report on The Law Relating to Succession (QRLC 22) at 11. See above, n 3 at 179.
present form and recommended neither abolition nor modification. And the Law Reform Commission of Hong Kong in considering an equivalent provision recommended only minor changes to modernise the language used. In not recommending to abolish the privilege, these law reform commissions recognise that privileged wills still play a role in the law of succession.

The modifications to s 26 of the Wills Act proposed above are not so much a widening of the privilege as a refinement. If adopted, they would ensure that the privilege of making informal wills is accorded only in appropriate situations to people who truly require it. And recent disasters, acts of terrorism and wars show that such situations are not unlikely to occur. The need for privileged wills is evident at a time when Singapore is increasing its involvement in international affairs by sending members of its police and armed forces on United Nations observer and peace-keeping missions. None of this diminishes the importance of formal will-making; in fact, people in high-risk occupations should be counselled both on the importance of creating formal wills and their capacity to make privileged ones. It would be ideal if the privileged will were never used, but it is better to keep it in our statute books so that it can be invoked in deserving cases.
